NO. 74-1451

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

J. H. ROSE, Warden, Tennessee State Penitentiary,
Petitioner

v.

HAROLD LOCKE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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v.

HAROLD LOCKE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Attorney General of Tennessee, on behalf of J. H. Rose, Warden, Tennessee State Penitentiary, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-5a) is not yet reported. The memorandum and order of the district court (App. B, *infra*, pp. 5a-6a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Tennessee crime against nature statute standing alone is unconstitutionally vague with respect to a conviction for forcibly performing cunnilingus against the victim's will.

2. Whether, if there was an unconstitutional vagueness, language in prior state court opinions had cured this vagueness as applied to cunnilingus by force against the victim's will.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . ."

Tenn. Code Annot. § 39-707 (1955) provides:

> "Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five (5) years nor more than fifteen (15) years."

STATEMENT

Harold Locke was convicted in state court of committing a "crime against nature," Tenn. Code Annot. § 39-707 (1955), by forcibly performing cunnilingus on a neighbor. The Tennessee Court of Criminal Appeals affirmed the conviction, rejecting appellant's claim that section 39-707 was unconstitutionally vague, *Locke v. State*, 501 S.W.2d 826, 828 (1973), and the Tennessee Supreme Court denied certiorari (November 28, 1973).

Thereafter, appellant filed, *pro se*, the instant petition for writ of habeas corpus in the U. S. District Court at Knoxville. That court, by order, rejected appellant's claim of unconstitutional vagueness in light of *Wainwright v. Stone*, 414 U.S. 21, and denied relief.

The Sixth Circuit in a per curiam opinion reversed, holding that the Tennessee crime against nature statute was unconstitutionally vague and previous Tennessee opinions had not cured that vagueness as applied to cunnilingus. The court of appeals failed to state which provision of the Constitution is violated by the Tennessee statute but we assume the court meant the Due Process Clause of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

1. ***The Sixth Circuit decision presents important questions of federal law which have not been but which should be settled by this court.***

Almost every jurisdiction has a statute which in one way or another prohibits unnatural sexual acts.[1] The

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[1] It is said in a Note, 49 Texas L. Rev. 400, n. 9 (1971) that the only states which do not are Illinois, Kansas and Connecticut. The statutes are collected in Comment, The Bedroom Should Not Be Within the Province of the Law, 4 Cal. W.L. Rev. 116, n. 12 (1968).

Tennessee rule is in accord with many jurisdictions which have considered whether cunnilingus is proscribed. The court of appeals cited *Cotner v. Henry*, 394 F.2d 873 (C.A. 7 1968) certiorari denied, 393 U.S. 847, where the court held that acts committed between consenting husband and wife were immune from prosecution under the Indiana sodomy statute under the theory of invasion of the right to privacy. No such consideration is involved in this case because the act was committed by force.[2] The court should settle the question whether or not the statutory term, "crime against nature," can in and of itself withstand a charge of unconstitutional vagueness as applied to cunnilingus by force.

2. ***The Sixth Circuit has decided this question in a way in conflict with Wainwright v. Stone, 414 U.S. 21, and other similar cases.***

The Fifth Circuit struck down Florida's crime against nature statute but this Court reversed in *Wainwright v. Stone, supra*. This Court in *Wainwright* said:

> "The judgment of federal courts as to the vagueness or not of a state statute must be made in the light of prior state constructions of the statute. For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation "we must take the statute as though it read precisely as the highest court of the State has interpreted it." Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273 (1940). When a state statute has been construed to forbid identifiable conduct so that "interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature," claims of impermissible vagueness must be judged in that light. Winters v. New York, 333 U.S. 507, 514 (1948). This has been the normal view in this Court. Fox v. Washington, 236 U.S. 273, 277 (1915); Beauharnais v. Illinois, 343 U.S. 250, 253 (1952); Mishkin v. New York, 383 U.S. 502, 506 (1966)." 414 U.S. at 22-23.

[2]The Seventh Circuit in **Cotner, supra**, said that Indiana courts might construe the statute as outlawing such physical relations between married couples when accomplished by force. 394 F.2d at 876-877. Accord, **Towler v. Peyton**, 303 F.Supp. 581 (W.D. Va. 1969) (approving conviction of defendant for forceful sodomy upon his wife).

The Sixth Circuit was in error in holding that language in prior state court opinions had not cured the unconstitutional vagueness discussed in Tenn. Code Annot. § 39-707 as applied to cunnilingus. The Tennessee Supreme Court in *Fisher v. State*, 197 Tenn. 594, 277 S.W.2d 340 (1955) rejected a narrow and restricted definition of crimes against nature as not including the crime of penetration per os and noted that the narrow and restricted definition of the offense of crime against nature statutes had been repudiated by many modern authorities.[3] As an illustration of modern authorities with which the court agreed, the court cited *State v. Cyr*, 135 Me. 513, 198 A. 743 (1938). The Tennessee Supreme Court in a later case, *Sherrill v. State*, 204 Tenn. 427, 321 S.W.2d 811 (1959) said that the court in *Fisher v. State, supra* had "adopted the Maine court opinion" of *State v. Cyr, supra*, 204 Tenn. at 429.

The Maine court opinion which the Tennessee Supreme court said it had "adopted" cited five cases where the

[3]The court in **Fisher** noted that at common law a crime against nature applied only to anal coitus and required penetration but nevertheless upheld a conviction for fellatio. This clearly put putative defendants on notice that Tennessee was not limiting the statute to its common law scope.

crime against nature statutes of those states could be applied to cunnilingus. The Maine court in *State v. Cyr*, *supra* said:

> "By the weight of recent authority apparently supported by better reasoning, sodomy as used in connection with statutes prohibiting the crime against nature is interpreted in its broad sense and held to include all acts of unnatural carnal copulation with mankind or beast. We shall not cumber our reports with a recital of the rulings or reasons given therefor. We are accord with the results reached in the following authorities. State v. Maida, 6 Boyce 40, 29 Del. 40, 96 A. 207; Herring v. State, 119 Ga. 709, 46 S.E. 876; Glover v. State, 179 Ind. 459, 101 N.E. 629, 45 L.A.R., N.S. 473; State of Kansas v. Hurlbert, 118 Kan. 362, 234 P. 945; State v. Guerin, 51 Mont. 250, 251, 152 P. 747; State v. Start, 65 Or. 178, 132 P. 512, 46 L.R.A., N.S. 266; In re Benites, 37 Nev. 145, 140 P. 436; State v. Fenner, 166 N.C. 247, 248, 80 S.E. 426, 128 N.W. 580; 8 R.C.L. § 365; 58 Corpus Juris 788." 198 A. at 743-744.

The Maine court thus expressly adopted the rationale of those cases and authorities cited *supra* at the end of its opinion. In *ex parte Benites*, *supra*, relied upon as authority by the Maine court, it was said:

> "Nature has provided in the male and the female the organs for the reproduction of the species. Any copulation by male with male, or by male with female, other than that copulation by and through the organs provided by nature for the reproduction of the species, is an act against the order of nature, and hence must of necessity be a crime against nature, inasmuch as it is an act against nature's law." 140 P. at 437.

The Court in *State v. Guerin*, *supra*, relied upon by the Maine court, said:

> "Every intelligent adult person understands fully what the ordinary course of nature demands or permits for the purpose of procreation, and that any departure from this course is against nature. It therefore seems to be trifling with our intelligence to say that copulation accomplished by use of the anus is against nature, whereas the same act accomplished by the use of the mouth is not. This view contravenes common sense. It would be just as appropriate to say that the term "mankind," as used in the statute, requires the prohibited act, in order to be a crime, to be accomplished upon a male person, whereas the term included the female as well as the male." 152 P. at 748.

Herring v. State, *supra*, a Georgia case relied upon by the Maine court, said the following:

> "Our Pen. Code 1895, § 382 defines this crime as follows: "Sodomy is the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." It will be noted that this definition contains no limitation as to the organ with which such unnatural connection may be made." 46 S.E. at 881.

The Court in *State v. Whitmarsh*, *supra*, a case cited by the Maine court, said:

> "After much reflection, we are satisfied, that, if the baser form of the abominable and disgusting crime against nature — i.e., by the mouth — had prevailed in the days of the early common law, the courts of England could well have held that that form of the offense was included in the current definition of the crime of sodomy." 128 N.W. at 583.

Also relied upon as authority in *State v. Cyr, supra*, is *State v. Hurlbert*, 118 Kan. 362, 234 P. 945, where the court said:

> "The court holds that proof of any actual lecherous penetration of the body of a man, woman or beast per os, per anum, or in any other manner contrary to nature, will sustain a conviction.

We see therefore that the Tennessee Supreme Court in 1959 "adopted" the opinion of the Maine Supreme Court which cited in support of a liberal view of the crime against nature statute five cases which left no doubt that cunnilingus is included as a crime against nature. We fail to see how another state's opinion which the Tennessee Supreme Court adopted which cites five cases making cunnilingus a crime fails to put "[m]en of common intelligence" on notice of the court's cunnilingus-reaching interpretation. *Winters v. New York*, 333 U.S. 507, 515. On the contrary, men of common intelligence should necessarily have concluded that this was a crime in Tennessee.

In *Bouie v. City of Columbus*, 378 U.S. 359, cited by the Sixth Circuit, this Court noted that application of the rule requiring the charge to be fairly stated was particularly compelling where the defendant's conduct cannot be deemed improper or immoral. But Locke's conduct was both improper and immoral because it was accomplished by unlawful force. Neither does this case involve those kind of rights which are especially protected because they involve freedom of speech or other fundamental civil liberties such as in *Winters v. New York*, 333 U.S. 507.

It was expressly held under Tennessee law that fellatio was a crime against nature. *Sherrill, supra*. Sex being

a suspect classification, one would think it would be equally included as a crime against nature for the male orally to have contact with the female sex organ as for the female with the male.

CONCLUSION

The State contends that a statute which prohibits a "crime against nature" constitutionally includes a prohibition against forcible cunnilingus. The State further contends that an earlier case of its Supreme Court which adopted an opinion of another state which cited five cases where like statutes could be applied to forcible cunnilingus was a sufficient gloss on the statute to identify the conduct prohibited.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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May, 1975

APPENDIX A

No. 74-1858

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

HAROLD LOCKE,
Plaintiff-Appellant,

v.

JIMMY H. ROSE, WARDEN,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided and Filed April 4, 1975.

Before: EDWARDS, PECK and LIVELY, Circuit Judges.

PER CURIAM. Plaintiff-appellant ("appellant") was convicted in state court of committing a "crime against nature," Tenn. Code Ann. § 39-707 (1955),[1] by forcibly performing cunnilingus on a neighbor. The Tennessee court of criminal appeals (2:1) affirmed the conviction, rejecting appellant's claim that section 39-707 was unconstitutionally vague, *Locke v. State*, — Tenn. Crim. App. —, 501 S.W.2d 826, 828 (1973), and the Tennessee Supreme Court denied certiorari (November 28, 1973).

[1] "Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five (5) years nor more than fifteen (15) years."

Thereafter, appellant filed, *pro se*, the instant petition for writ of habeas corpus in the district court. That court, by order, rejected appellant's claim of unconstitutional vagueness in light of *Wainwright v. Stone*, 414 U.S. 21 (1973), and denied relief. We reverse.

[2]

We do not understand defendant-appellee ("appellee") as arguing that the statutory term, "crimes against nature," could in and of itself withstand a charge of unconstitutional vagueness. Neither could appellee so argue, *Harris v. State*, 457 P.2d 638 (Alas. 1969), *see Perkins v. State*, 234 F. Supp. 333, 336 (W.D.N.C. 1964), *Hogan v. State*, 84 Nev. 372, 441 P.2d 620, 621 (1968), particularly since courts have differed widely in construing the reach of "crimes against nature" to cunnilingus. Compare *Parris v. State*, 43 Ala. App. 351, 190 So.2d 564 (1966) and *Warner v. State*, 489 P.2d 526 (Okla. Crim. 1971) with *State v. Hill*, 179 Miss. 732, 176 So. 719 (1937) and *Estes v. State*, 244 Ind. 691, 195 N.E.2d 471, 473 (1964) (but see *Dixon v. State*, 256 Ind. 266, 268 N.E.2d 84 (1971)).

Although *Stone* upheld the constitutionality of Florida's "crime[s] against nature statute," Fla. Stat. Ann. § 800.01 (1969), as applied to copulation per os and per anum, the Court noted that the Florida statute had long been construed as proscribing "[t]hese very acts." See, e.g., *Delaney v. State*, 190 So.2d 578 (Fla. Sup. Ct. 1966), appeal dismissed, 387 U.S. 426 (1967); *Ephraim v. State*, 32 Fla. 93, 89 So. 344 (1921). Conversely, no reported Tennessee opinion had previously applied the Tennessee statute to cunnilingus.[2] Section 39-707 had been applied exclu-

[2]But cf. Polk v. Ellington, 309 F. Supp. 1349 (W.D. Tenn. 1970).

sively as proscribing copulation per anum, *Johnson v. State*, 201 Tenn. 11, 296 S.W.2d 832 (1956), *Stephens v. State*, — Tenn. Crim. App. —, 489 S.W.2d 542 (1972), and fellatio, *Fisher v. State*, 197 Tenn. 594, 277 S.W.2d 340 (1955), *Sherrill v. State*, 204 Tenn. 427, 321 S.W.2d 811 (1959), *Boulton v. State*, 214 Tenn. 94, 377 S.W.2d 936 (1964), *Davis v. State*, 11 Tenn. Crim. App. 345, 442 S.W.2d 283 (1969).

Appellee, however, argues that language in prior state court opinions, particularly in *Sherrill*, *supra*, have cured the unconstitutional vagueness of section 39-707 as applied to cunnilingus. Though *Sherrill* explicitly adopted the "liberal" stat-

[3]

utory construction of *State v. Cyr*, 135 Me. 513, 198 A. 743 (1938), *Cyr* involved fellatio rather than cunnilingus. Moreover, *Sherrill* failed to cite *State v. Townsend*, 145 Me. 384, 71 A.2d 517, 518 (1950), which applied the Maine statute to cunnilingus. Even had *Sherrill* cited *Townsend*, however, such citation most likely would still have failed in putting "[m]en of common intelligence," *Winters v. New York*, 333 U.S. 507, 515 (1948), on notice of the court's cunnilingus-reaching interpretation. Likewise, *Stephens*, *supra*, even assuming that it preceded appellant's challenged act[3] cannot preclude "men of common intelligence [from] necessarily guess[ing] at its meaning and differ[ing] at its application" as applied to cunnilingus. *Bouie v. Columbia*, 378 U.S. 347, 351 (1964).

[3]Stephens was filed on September 28, 1972. Appellant's petition for writ of habeas corpus indicates that he was convicted on October 3, 1972, the forced cunnilingus thereby virtually certainly occurring prior to September 28, 1972.

Stephens, the Tennessee courts' most candid attempt at outlining the scope of section 39-707, defined the statutory "crime against nature" as

> "a euphemism for the particular acts that constitute the offense of sodomy at common law . . . . In its narrower sense sodomy is the carnal copulation between two human beings per anus, or by a human being in any manner with a beast. In its broader sense it is the carnal copulation by human beings with each other against nature or with a beast in which sense it includes all acts of unnatural copulation. Our courts *probably* accept the broader meaning . . . ." (Emphasis added) 489 S.W.2d at 543.

First, sodomy at common law included only copulation per anum. *Perkins*, *supra*, at 335; Note, The Crimes Against Nature, 16 J. Public Law 159, 162 (1967). Second, *Stephens* only hinted that Tennessee "probably" accepts the broader view of crimes against nature. Moreover, even had the court

[4]

expressly adopted the broader view, such view, as described, proscribing "carnal copulation by human beings with each other against nature . . . includ[ing] all acts of unnatural copulation," would still fail to give "fair warning," *Bouie*, *supra*, at 350, of the proscription of cunnilingus.

In accordance with the foregoing, the judgment of the district court is reversed and the case is remanded to the district court for remand to the Criminal Court of Knox County for such further proceedings as may be deemed appropriate and permissible under the applicable law, such as a proscription for aggravated assault and battery,

see, e.g., *Locke*, *supra*, 501 S.W.2d at 831; and provided further that if no such proceedings are instituted within sixty days of such remand, the writ shall issue and appellant shall stand discharged.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

MAR 19 1974

HAROLD LOCKE	
v.	CIV. 3-74-54
JIMMY H. ROSE, WARDEN	

ORDER

Petitioner, Harold Locke, has filed this action pursuant to Title 28 U.S.C. § 2254 for habeas corpus relief on the grounds that (1) the statute under which he was convicted, namely, T.C.A. § 39-707, is unconstitutionally vague; and (2) that he was denied due process of law since he was convicted upon the uncorroborated testimony of the victim who he contends was his accomplice. Since petitioner presents purely legal issues and not ones of fact, an evidentiary hearing is not required. Title 28 U.S.C. § 2254.

Appendix B

In light of the recent decision by the Supreme Court in the case of *Wainwright v. Stone*, 414 U.S. 21 (1973), we have carefully examined

[2]

T.C.A. § 39-707 and the pertinent decisions thereunder and conclude that the statute, as construed by the courts of Tennessee, is not unconstitutionally vague nor impermissibly overbroad. See, e.g. *Fisher v. State*, 197 Tenn. 594 (1955); *Sherrill v. State*, 207 Tenn. 427 (1959); *Stephens v. State*, 489 S.W.2d 542 (Tenn.Cr.App. 1973); *Locke v. State*, 501 S.W.2d 826 (Tenn.Cr.App. 1971); see also the unreported decisions of *State v. Wade*, (Tenn. May 21, 1973), a decision of the Supreme Court of Tennessee sitting at Jackson; *Lane v. State*, No. 12 Campbell Criminal (Tenn.Cr.App. July 23, 1973).[1]

We are further of the opinion that petitioner's second ground fails to state a claim of constitutional significance and is not cognizable in an action of this nature. Notwithstanding this fact, the record fails to disclose whether petitioner has exhausted the appropriate post-conviction remedies available to him under the laws of Tennessee as to this issue.

For the stated reasons, it is accordingly ORDERED that petitioner's application for habeas corpus relief be, and same hereby is, denied.

/s/ Robert L. Taylor
United States District Judge

---

[1] A copy of **Lane**, supra, is attached as an appendix to this order.

Appendix B

IN THE
COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
MAY 1973

This opinion will be released and filed on July 23, 1973 at 2:30 o'clock P.M.
JOHN A. PARKER, Clerk

CHARLES W. LANE,
Plaintiff in Error

V.

STATE OF TENNESSEE,
Defendant in Error

NO. 12
CAMPBELL CRIMINAL
Honorable D. L. Hutson, Judge
(Crime Against Nature)

FOR THE PLAINTIFF IN ERROR:

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Appendix B

JUDGMENT AFFIRMED

MARK A. WALKER, PRESIDING JUDGE

OPINION FILED:

[fol. 2] **OPINION**

In two indictments the Campbell County grand jury charged the defendant, Charles W. Lane, with kidnapping and a crime against nature. The cases were heard together and the trial jury found Lane not guilty of kidnapping but guilty of a crime against nature and fixed his punishment for that offense at five years' imprisonment in the penitentiary. He appeals in error first assigning that the evidence preponderates against the verdict.

On June 5, 1972, Donald G. McKinney, Jr., age 18, had been fishing from the houseboat of a friend, Carl Fitzwater, at Norris Dam boat dock. About 1:00 A.M. that day by McKinney's testimony, he stopped at the defendant's houseboat where Fitzwater was at the time; that the defendant sent him to get some cigarettes and when he returned Fitzwater was gone; the defendant locked the door and with a sawed-off shotgun forced him to go upstairs where the defendant threatened to kill him unless he did as he was told and thereupon forced him (McKinney) to engage in fellatio; that the defendant then took him to Fitzwater's houseboat where the defendant forced Fitzwater out of bed and compelled McKinney to engage in fellatio with Fitzwater and again to perform the same act on the defendant. McKinney says that Fitzwater was drunk and frightened and told him he was sorry. McKinney also says that the defendant required him to write his telephone number on a piece of paper. He says

Appendix B

he purposely reversed some digits in the number. The paper he gave was found on the defendant when he was later arrested.

McKinney reported the offense to security officers a short time later and had them call his father to come there. This led to the defendant's arrest.

Fitzwater, age 64, testified he was intoxicated
[fol. 2] and passed out while watching television. He says he went to sleep and does not remember anything during this period of time.

The defendant, age 45, is married and has children. From his testimony he is a successful businessman with no criminal record. He denied any criminal conduct. He explained that the shotgun did not belong to him but had been left there by another and that he had merely shown it to McKinney at Fitzwater's request. He said that McKinney wanted work and gave him the paper with his telephone number for that purpose. He denied making any threats or that any crime against nature was committed at all.

The jury accepted the state's theory of the case as given in the testimony of McKinney. We do not think the evidence preponderates against it. The assignment on the weight of the evidence is overruled. See *Grace v. State*, ___ Tenn. ___, 493 S.W.2d 474.

The defendant offered a character witness who testified as to the general reputation of the defendant in his community and his reputation as to veracity. The court declined to permit the witness, an insurance agent, to testify further as to the investigative report made by an agency when the defendant applied for insurance. The court properly held this report inadmissible.

The assignment that the acquittal of the kidnapping charge precluded this conviction is without merit. See *Sanders v. State*, Tenn.Cr.App., 467 S.W.2d 821.

Finally, the defendant contends that the statute T.C.A. 39-707 is unconstitutionally vague and overbroad.
[fol. 3] In the unpublished per curiam opinion of *State v. Wade M. Williams*, filed May 21, 1973, our Supreme Court adopted Judge Mitchell's opinion holding this statute constitutional. It held:

"'We reject the contention that the statute is unconstitutional. Although our Supreme Court has considered this statute in recent cases we are cited to no Tennessee decision which the Supreme Court of Tennessee has held T.C.A. 39-707 Crime Against Nature unconstitutional. But particularly in the case of Sherrill v. State, 204 Tenn. 427, 321 S.W.2d 811, the Court defined fellatio and held it was included in the felony of Crime Against Nature. There the Court said:

"'Section 39-707, T.C.A., makes "a crime against nature" a felony. This statute does not go into detail and set forth what each of these crimes are but we, in Fisher v. State, 197 Tenn. 594, 277 S.W. 2d 340, have adopted the Maine Court opinion. State v. Cyr, 135 Me. 513, 198 A. 743. That Court said in part:

"'The statute gives no definition of the crime but with due regard to the sentiments of decent humanity treats it as one not fit to be named, leaving the record undefiled by the details of different acts which may constitute the perversion. The generality of the prohibition brings all unnatural copulation with mankind or a beast, including sodomy, within its scope.'" 198 A. 743.

"'Thus it is that the statute under which this man was indicted and convicted and which was read and charged to the jury includes the crime here charged of fellatio, which in common language means sexual perversion committed with the male sexual organ and the mouth.'

"'Thus this decision of the Supreme Court of Tennessee by its definition of Fellatio, and its holding that fellatio is included in Crime Against Nature is sufficient notice to the citizen that who commits fellatio may be subjected to indictment and prosecution under the Crime Against Nature statute.'"

In *Stephens v. State*, Tenn. Cr.App., 489
[fol. 4] S.W.2d 542, we also held the statute not unconstitutionally vague. In the unpublished opinion of *Willie Edward Taylor v. State* (cert. denied April 2, 1973), we again held the statute constitutional.

All assignments are overruled and the judgment is affirmed.

MARK A. WALKER
Mark A. Walker, Presiding Judge

CONCUR:

W. WAYNE OLIVER
W. Wayne Oliver, Judge

ROBERT K. DWYER
Robert K. Dwyer, Judge